STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 20, 2007
v	No. 271677 Wayne Circuit Court
DARNELL DESHAWN BRANTLEY, Defendant-Appellant.	LC No. 06-002102-01

Before: Markey, P.J., and Saad and Wilder, JJ.

PER CURIAM.

Defendant was convicted, following a bench trial, of two counts of assault with intent to commit murder, MCL 750.83, felonious assault, MCL 750.82, and possession of a firearm during the commission of a felony, MCL 750.227b. He was sentenced to concurrent prison terms of 125 to 180 months for the assault with intent to commit murder convictions, two to fours years for the felonious assault conviction, and a consecutive two-year term of imprisonment for the felony-firearm conviction. He appeals by right. We affirm. This appeal is being decided without oral argument pursuant to MCR 7.214(E).

Defendant first argues that trial counsel was ineffective for failing to call his grandmother, Ceola Brantley, as a witness. Because defendant failed to raise this claim below in a motion for a new trial or an evidentiary hearing, review is limited to the existing record. *People v Snider*, 239 Mich App 393, 423; 608 NW2d 502 (2000). "To establish a claim of ineffective assistance of counsel, the defendant must show that counsel's performance was deficient and that there is a reasonable probability that, but for the deficiency, the factfinder would not have convicted the defendant." *Id*. at 424. Appellate courts "must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance; that is, the defendant must overcome the presumption that, under the circumstances, the challenged action 'might be considered sound trial strategy.'" *Strickland v Washington*, 466 US 668, 689; 104 S Ct 2052; 80 L Ed 2d 674 (1984) (citation omitted).

"Decisions regarding what evidence to present and whether to call or question witnesses are presumed to be matters of trial strategy." *People v Rockey*, 237 Mich App 74, 76; 601 NW2d 887 (1999). Likewise, decisions regarding how to cross-examine and impeach witnesses are matters of trial strategy. *In re Ayres*, 239 Mich App 8, 23; 608 NW2d 132 (1999). A defendant may establish ineffective assistance of counsel based on defense counsel's failure to call witnesses only if the failure deprives the defendant of a substantial defense, i.e., one that might

have made a difference in the outcome of the trial. *Id*. at 22. But this Court will not find ineffective assistance merely because a strategy backfires, or assess counsel's competence with the benefit of hindsight. *Id*.; *Rockey, supra* at 76-77.

One of the victims, Nikki Adams, testified that after defendant and two accomplices opened fire on her house, she went to defendant's house to speak to Brantley. Defendant contends that counsel should have called Brantley to testify that although Adams came to her house, she never spoke to Adams. However, defendant has not shown that Brantley's testimony was admissible. Whether Adams spoke to Brantley at her home was not material to the issues to be determined in this case, and the general rule is that extrinsic evidence may not be used to impeach a witness on a collateral matter. *People v Rosen*, 136 Mich App 745, 758; 358 NW2d 584 (1984). Furthermore, Brantley's proposed testimony would have confirmed Adams's testimony that she went to Brantley's house. Thus, it was reasonable to decline to call Brantley to impeach Adams on one point to avoid having her confirm Adams's testimony on another point. Additionally, it is not reasonably probable that impeaching Adams' testimony on this one minor point would have affected the outcome of the trial in light of the other evidence establishing defendant's guilt. Accordingly, defendant has not shown that counsel's failure to call Brantley constituted error or deprived him of a substantial defense.

Defendant next argues that he did not validly waive his right to a jury trial. Because defendant did not raise this issue below, he must establish a plain error that affected his substantial rights. *People v Carines*, 460 Mich 750, 763-764; 597 NW2d 130 (1999).

A criminal defendant may waive a trial by jury if the prosecutor consents and the court approves. MCL 763.3. "A valid waiver of the constitutional right to a trial by jury must be voluntary." *People v Godbold*, 230 Mich App 508, 512; 585 NW2d 13 (1998). Before accepting a waiver, the court must advise the defendant of his right to a trial by jury and ascertain, by questioning the defendant personally, that he understands and voluntarily chooses to give up that right and be tried by the court. MCR 6.402(B).

The record shows that defendant was advised of his right to a jury trial both orally and in writing and that he understood that he had a right to a jury trial and voluntarily gave up that right. Defendant argues that the trial court erred by failing to explain and ascertain that he understood what a jury trial is. But, in *People v Leonard*, 224 Mich App 569, 595-596; 569 NW2d 663 (1997), this Court rejected a claim that a jury waiver was invalid because the trial court did not advise the defendant of the meaning of the right to a jury trial. Therefore, defendant has failed to establish plain error.

We affirm.

/s/ Jane E. Markey
/s/ Henry William Saad
/s/ Kurtis T. Wilder